In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1056

WILLIAM FIORE, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner's main claim is that 29 U.S.C. 216(a), which allows imprisonment only upon a *second* conviction for violating the Fair Labor Standards Act, should by implication bar incarceration for a conviction under 18 U.S.C. 401 for criminal contempt of a court order enjoining noncompliance with the Act.

On November 11, 1959, petitioner consented to an injunction issued by the United States District Court for the Western District of Pennsylvania pursuant to 29 U.S.C. 217, restraining him—individually and doing business as William Fiore Contracting Company—from violating certain overtime and record-keeping provisions of the Fair Labor Standards Act (29 U.S.C. 207, 211(c)). On April 19, 1962, petitioner consented to a decree (1) holding him

in civil contempt of the 1959 order, (2) requiring restitution of $1,859.50 in back wages wrongfully withheld, and (3) broadening the scope of the 1959 injunction to require compliance with the minimum wage provisions of the Act (29 U.S.C. 206). On April 25, 1965, petitioner was found in civil and criminal contempt of the injunction as amended. Having been advised that petitioner at that time had made restitution of back wages amounting to $15,000, the district court imposed a compensatory fine of $1,000, representing the costs of the investigation, and a criminal punitive fine of $1,000.

On December 3, 1971, the government petitioned the district court requesting that petitioner again be found in civil and criminal contempt for continued violation of the wage, overtime, and record-keeping provisions of the prior injunctions issued under the FLSA. The civil and criminal contempt proceedings were tried together before the district court, without a jury, in January 1972. Following trial, the district court entered a civil judgment against petitioner and his company for $31,654.57 in back wages, and against petitioner individually for $12,000, including $2,000 for the government's investigative costs, and a "remedial" fine of $10,000 as punishment for the civil contempt.[1] Petitioner was also ordered to pay the court costs.

The court also found that petitioner was "guilty of criminal contempt * * * beyond a reasonable doubt" (Pet. App. 15, n. 2), and sentenced him, pursuant to 18 U.S.C.

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[1] The government found unclear the "remedial" purposes of the $10,000 fine, since it appeared unrelated to the government's expenses or to the back wages illegally withheld. Accordingly, the government did not seek affirmance of this portion of the judgment (see Pet. App. 20).

401, to imprisonment for 60 days but added that on payment of the civil judgment and costs within 30 days of February 15, 1972, the prison term would be reduced to 30 days. The court of appeals upheld the criminal and civil sanctions (Pet. App. 12-21), with one judge dissenting on the issue whether petitioner could properly be imprisoned for criminal contempt (Pet. App. 21-27).[2]

1. Petitioner contends that the district court lacked the power to punish him by imprisonment, because he had not previously been convicted of having violated the Fair Labor Standards Act. He argues that 29 U.S.C. 216(a), which allows imprisonment only upon a *second* conviction for violating the Fair Labor Standards Act,[3] should restrict the power of courts under 18 U.S.C. 401 to jail offenders for criminal contempt of a court order enjoining noncompliance with the Act. This contention is answered in the opinion of the court below, on which we principally rely, holding that the limitation on imprisonment for violations of the Fair Labor Standards Act was not intended to narrow the power expressly granted to a judge under 18 U.S.C. 401 to punish by imprisonment a deliberate violation of the court's order (Pet. App. 18-19). Peti-

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[2] The majority modified the financial penalties imposed by the district court, removing the $10,000 "remedial fine," which it found to be punitive and therefore not authorized by the criminal contempt statute, 18 U.S.C. 401, when imposed in addition to imprisonment (Pet. App. 20-21).

[3] 29 U.S.C. 216(a) provides:

> Any person who willfully violates any of the provisions of section 215 of this Title shall upon conviction thereof be subject to a fine of not more than $10,000 or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

tioner is not to be imprisoned because he violated the Act, but because he acted in contempt of a court order. That the order paralleled the statutory requirements does not make it any less an order. Petitioner's contemptuous conduct should be punishable by imprisonment under 18 U.S.C. 401, notwithstanding that the same conduct could not be punished by imprisonment in the absence of the court order.

As the court of appeals observed (Pet. App. 19), petitioner's argument has been "squarely rejected" in *United States* v. *Fidanian*, 465 F. 2d 755 (C.A. 5), certiorari denied, No. 72-5416, December 4, 1972. In *Fidanian*, the defendant was sentenced to six months' imprisonment for not complying with a consent decree enjoining him and his company from violating the Fair Labor Standards Act. The defendant had never before been adjudged in contempt of the court's order. The defendant in *Fidanian* argued, as does petitioner, that affirming the conviction would be giving approval to the government's attempt to circumvent the restrictions on imprisonment which Congress placed in Section 216(a). As the court in *Fidanian* stated (465 F. 2d at 758):

> It is more correct to say that a reversal would constitute approval of the defendant's attempt to circumvent the usual consequences of a willful disobedience of the orders of the court. * * *

This analysis applies with even greater force in the instant case, where petitioner has on two prior occasions been adjudged in contempt, including one earlier conviction for criminal contempt. See also *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450.

2. Petitioner also objects to certain procedures followed by the district court, most notably the failure to initiate

the criminal contempt proceeding by indictment. He also claims that he was deprived of the right to a jury trial on the ground that the imposition of a $10,000 punitive fine—even though vacated by the court of appeals (Pet. App. 20-21)—permanently elevated his crime to the status of a "non-petty" offense. These arguments are fully discussed and properly rejected in the majority opinion below (Pet. App. 16-18), upon which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.